

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB SEPT 8,99

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Norstar Consumer Products Co., Inc.

Serial No. 75/252,116

John L. Welsh of Aquilino & Welsh, P.C. for Norstar
Consumer Products Co., Inc.

Irene D. Williams, Trademark Examining Attorney, Law Office
112 (Janice O'Lear, Managing Attorney).

Before Quinn, Hohein and Chapman, Administrative Trademark
Judges.

Opinion by **Chapman**, Administrative Trademark Judge:

An application has been filed by Norstar Consumer
Products Co., Inc. to register the mark HEEL & SOLE for
"foot balm".¹

Registration has been refused under Section 2(e)(1) of
the Trademark Act, 15 U.S.C. §1052(e)(1), on the basis that

¹ Application Serial No. 75/252,116, filed March 5, 1997, in
which applicant alleges a bona fide intention to use the mark in
commerce.

the mark HEEL & SOLE, when applied to the goods of the applicant, is merely descriptive of them.

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested. We affirm.

The Examining Attorney contends that "the mark HEEL & SOLE is merely a combination of two ordinary descriptive terms which conveys an immediate idea to potential purchasers that the applicant's goods consist of a balm for the heel and sole of the foot." (Brief, p. 3)

In support of the refusal to register, the Examining Attorney submitted the following definitions from Webster's II New Riverside University Dictionary (1984):

- (1) "heel" is defined as "1a. The rounded posterior portion of the human foot under and behind the ankle."; and
- (2) "sole" is defined as "1. The under surface of the foot."

The Examining Attorney also submitted three excerpts from a Nexis search to "show that heel and sole is used in connection with foot balm." (Final Office action, p. 1).

Applicant argues that its mark "is a compound word mark which may describe possible application zones for the goods," and the mark "may be highly suggestive of where the goods are to be used," but the mark only "suggests a

possible manner of use of the foot balm and is not merely descriptive of the foot balm per se." (brief, p. 3).

Applicant also argues that the mark could be suggestive of or connote any one of several concepts, including, shoe stores, sock outlets, apparel for the feet, corrective devices for the feet, and even the "heel" and "sole" of a golf club head; and that the phonetic equivalents ("heal" and "soul") of these words relate to restoring health and the spiritual part of human beings.

The test for determining whether a mark is merely descriptive is whether the term immediately conveys information concerning a quality, characteristic, function, ingredient, attribute or feature of the product or service in connection with which it is used, or intended to be used. See *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215 (CCPA 1978); and *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979). Further, it is well-established that the determination of mere descriptiveness must be made not in the abstract or on the basis of guesswork, but in relation to the goods or services for which registration is sought, the context in which the term or phrase is being used on or in connection with those goods or services, and the impact that it is likely to make on the average purchaser of such goods or services. See *In re*

Consolidated Cigar Co., 35 USPQ2d 1290 (TTAB 1995); and In re Pennzoil Products Co., 20 USPQ2d 1753 (TTAB 1991).

In the present case, we agree with the Examining Attorney that HEEL & SOLE is merely descriptive of foot balm. The ordinary, commonly understood meanings of the words "heel" and "sole" in the context of applicant's goods immediately inform prospective purchasers that applicant's balm is intended as a product for the heel and sole of a person's foot. That is, the mark HEEL & SOLE is straightforward, and we are not persuaded that, when viewed in the context of applicant's goods, the purchasing public would immediately think of any other possible meanings (e.g., shoe stores, golf club heads, phonetic equivalent meanings) when they are considering foot balm. These two very common terms name parts of the body that the goods are intended to be used on. Thus, in the context of applicant's goods (foot balm), the mark merely describes the goods to the purchasing public.

Applicant's mark is not incongruous, creates no double meaning, takes no imagination or thought as to meaning, and does not create a commercial impression or meaning which relates to anything except the parts of the foot.² Further,

² The case now before us is distinguishable from cases that involve marks which are suggestive of a desired *result* of the use

the two words when combined and used on foot balm, do not create an immediate and separate impression or association with some common phrase. See e.g., *In re Colonial Stores Incorporated*, 394 F.2d 549, 157 USPQ 382 (CCPA 1968) (SUGAR & SPICE held not merely descriptive when used on bakery products).

Decision: The refusal to register under Section 2(e)(1) is affirmed.

T. J. Quinn

G. D. Hohein

B. A. Chapman
Administrative Trademark Judges,
Trademark Trial and Appeal Board

of the goods such as, *In re Nalco Chemical Company*, 228 USPQ 972 (TTAB 1986) (VERI-CLEAN held not merely descriptive when used on anti-fouling additives for use in refineries), and the cases cited therein, including *In re Pennwalt Corporation*, 173 USPQ 317 (TTAB 1972) (DRI-FOOT held not merely descriptive when used on anti-perspirant deodorant for feet).